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14 **UNITED STATES DISTRICT COURT**

15 **DISTRICT OF NEVADA**

16 LAS VEGAS SKYDIVING ADVENTURES
 17 LLC, a Nevada limited-liability company,

18 Case No.: 2:18-cv-2342

19 Plaintiff,

20 **COMPLAINT**

21 v.

22 Groupon, Inc., a Delaware corporation,

23 **JURY TRIAL REQUESTED**

24 Defendant.

25 Plaintiff Las Vegas Skydiving Adventures LLC (“Plaintiff” or “LV Skydiving”), by and
 26 through its counsel, Gibson Lowry LLP, complains as follows against Defendant, Groupon, Inc.
 27 (“Defendant” or “Groupon”), on information and belief, that the following are and have been true
 28 at all time relevant to this lawsuit unless otherwise indicated specifically to the contrary:

29 **JURISDICTION**

30 1. This Court has original jurisdiction over Plaintiff’s First through Third Causes of
 31 Action, inclusive (the “Federal Law Causes of Action”) pursuant to 15 U.S.C. § 1121(a), 15
 32 U.S.C. § 4, and 28 U.S.C. § 1331, because the Federal Law Causes of Action arise under the
 33 Sherman Act and the Lanham Act, and this Court has supplemental jurisdiction over Plaintiff’s
 34 Fourth and Fifth Causes of Action (the “State Law Causes of Action”) pursuant to 28 U.S.C. §
 35 1338(b) and 1337 because the State Law Causes of Action are so related to the Federal Law
 36 Causes of Action as to form part of the same case or controversy as the Federal Law Causes of

1 Action pursuant to Article III of the United States Constitution.

2. This Court has personal jurisdiction over Groupon under 15 U.S.C. § 22, because
 3 Groupon transacts business in the District of Nevada and is hereby the subject of a proceeding
 4 under the antitrust laws of the United States.

5 **NATURE OF ACTION**

6. This is an action for anticompetitive commercial activity under 15 U.S.C. § 2,
 7 direct service mark infringement under 15 U.S.C. § 1114, misappropriation of commercial
 8 properties under Nevada common law, and unjust enrichment under Nevada common law.
 9 Groupon has engaged in anticompetitive conduct that involves a scheme aimed at depressing
 10 prices and driving out competition for provision of tandem tethered skydiving services in
 11 southern Nevada, and in furtherance of that scheme, has illegitimately engaged in infringement
 12 of LV Skydiving's registered service mark and misappropriation of LV Skydiving's
 13 commercially valuable intellectual property, which conduct has, at a minimum, resulted in the
 14 unjust enrichment of Groupon at LV Skydiving's expense.

15 **PARTIES**

16. LV Skydiving is a limited-liability company organized under the laws of the State
 17 of Nevada.

18. Groupon is a corporation organized under the laws of the State of Delaware.

19 **VENUE**

20. Venue is proper in this judicial district under 28 U.S.C. § 1391(b)(2) because LV
 21 Skydiving owns and uses the intellectual property at issue in this matter in the District of
 22 Nevada, and thus a substantial part of the property that is the subject of this action is sited in the
 23 District of Nevada.

24. Venue is proper in this judicial district under 28 U.S.C. § 1391(b)(2) because a
 25 substantial part of the events giving rise to this claim occurred in the District of Nevada.

26. Venue is proper in this judicial district under 28 U.S.C. § 1391(b)(3) because
 27 Groupon is subject to this Court's personal jurisdiction with respect to this action.

28. This case is appropriately assigned to the southern division of the District of

1 Nevada because LV Skydiving's principal place of business is in Clark County.

2 **FACTS**

3 10. LV Skydiving offers services to individuals who wish to have the experience of
 4 jumping out of an airplane while tethered to an experienced parachutist (the "Relevant
 5 Services").

6 11. LV Skydiving is part of the group of businesses that sells the Relevant Services to
 7 residents of and visitors to southern Nevada who wish to have the experience of jumping out of
 8 an airplane while tethered to an experienced parachutist (such group of businesses in such
 9 geographic area the "Market").

10 12. Groupon controls the majority of the Market as of the filing date of this
 11 Complaint.

12 13. LV Skydiving offers the Relevant Services using the service mark FYROSITY
 14 ("LV Skydiving's Mark").

15 14. LV Skydiving first used LV Skydiving's Mark in commerce on June 7, 2016.

16 15. The United States Patent and Trademark Office granted registration number
 17 5258918 to LV Skydiving's Mark on August 8, 2017, as depicted in Exhibit 1 attached hereto
 and incorporated herein.

18 16. Groupon operates an online business providing customers with the Relevant
 19 Services by way of providing discount certificates that Groupon's customers may use with
 20 businesses that maintain a relationship with Groupon to help enable Groupon to provide the
 21 Relevant Services (such businesses the "Groupon Affiliates"; Groupon's business model the
 22 "Groupon Scheme").

23 17. The Groupon Scheme includes Groupon's aggressive recruitment of all or nearly
 24 all of the businesses in the Market to become Groupon Affiliates.

25 18. The Groupon Scheme includes, without limitation, Groupon's aggressive online
 26 promotional efforts, including, without limitation, intensive search-engine optimization
 27 techniques (with intensive use of metadata embodiments), all of which target the Market.

28 19. Virtually every provider of the Relevant Services in the Market, other than LV

1 Skydiving, has become a Groupon Affiliate.

2 20. As part of the Groupon Scheme, Groupon Affiliates are obligated to provide the
3 Relevant Services to Groupon customers as mandated in Groupon Affiliates' contracts with
4 Groupon (such contracts the "Groupon Affiliate Contracts").

5 21. Groupon's activities in the Market in implementing the Groupon Scheme have
6 caused Market consumers to expect deeply discounted pricing with respect to the Relevant
7 Services.

8 22. The deeply discounted pricing in the Market for which Groupon has created a
9 consumer expectation, through Groupon's implementation of the Groupon Scheme, has caused
10 harm and will continue to cause harm LV Skydiving's business.

11 23. As a further element of the Groupon Scheme, Groupon has included LV
12 Skydiving's name and LV Skydiving's Mark in the metadata of Groupon's website (the
13 "Groupon Website") without LV Skydiving's permission (such activity the "Metadata
14 Infringement").

15 24. Groupon engages in Metadata Infringement so that consumers using LV
16 Skydiving's Mark as a search term in their generalized Internet searching are diverted to
17 Groupon for provision of the Relevant Services.

18 25. Additionally, Groupon has constructed the Groupon Website in such a manner as
19 to enable potential customers searching for LV Skydiving as a service provider to be
20 misleadingly diverted to Groupon Affiliates upon consumers' using the Groupon Website.

21 26. Groupon is able to sell the Relevant Services at a deeply discounted price as
22 compared to competitors due to Groupon's share of the Market, which has driven down pricing
23 for the Relevant Services and driven out competitors.

24 27. Groupon is able to sell the Relevant Services a deeply discounted price as
25 compared to competitors due, at least in part, to the fact that Groupon engages in Metadata
26 Infringement and thus diverts customers from businesses like LV Skydiving that are not
27 Groupon Affiliates, further driving competitors with respect to the Relevant Services out of the
28 Market.

1 28. On or about August 7, 2018, a person affiliated with an airport in southern
2 Nevada speculated in a Facebook posting regarding whether LV Skydiving was a Groupon
3 Affiliate and shared in the same posting a video originally posted on LV Skydiving's own
4 Facebook page in which LV Skydiving congratulated an LV Skydiving customer on completing
5 a tandem tethered skydive (the "Shared Facebook Congratulations").

6 29. Within hours of the posting of the Shared Facebook Congratulations, Groupon
7 effectuated the posting of a comment with respect to the Shared Facebook Congratulations
8 stating, "Hi! Here is the link to all the skydiving Groupon deals from Vegas, [link omitted].
9 Hope you'll find something for you!" (the "Predatory Groupon Link").

10 30. Consumers clicking on the Predatory Groupon Link reach a page on the Groupon
11 site titled "skydive Fyrosity" (the "Unauthorized FYROSITY Page").

12 31. The Unauthorized FYROSITY Page only provides consumers with the ability to
13 purchase the Relevant Services from Groupon, to be provided only by Groupon Affiliates and
14 not by LV Skydiving.

15 32. The Unauthorized FYROSITY Page is designed by Groupon in a manner to
16 obfuscate the fact that the Relevant Services advertised thereon are provided by Groupon
17 Affiliates, not by LV Skydiving.

18 33. LV Skydiving has never authorized Groupon to use LV Skydiving's Mark in any
19 manner.

20 34. LV Skydiving has requested that Groupon cease using LV Skydiving's Mark in
21 any manner.

22 35. Groupon has not ceased using LV Skydiving's Mark despite LV Skydiving's
23 request.

24 36. The artificial depression of pricing for the Relevant Services caused by Groupon
25 has caused economic harm to LV Skydiving.

26 37. The Metadata Infringement has caused economic harm to LV Skydiving through
27 Groupon's diversion of potential LV Skydiving customers to Groupon Affiliates.

28 38. Groupon's registered mark infringement and consequent false designation of

1 origin of the Relevant Services effectuated by pages like the Unauthorized FYROSITY Page has
2 caused economic harm to LV Skydiving through Groupon's diversion of potential LV Skydiving
3 customers to Groupon Affiliates.

4 39. The Groupon Website's functionality has caused economic harm to LV Skydiving
5 by presenting consumers with the Unauthorized FYROSITY Page and comparable pages
6 dependent on infringement of LV Skydiving's Mark and misappropriation of LV Skydiving's
7 commercial property, which conduct has caused diversion of potential LV Skydiving customers
8 to Groupon Affiliates.

FIRST CAUSE OF ACTION

MONOPOLIZATION UNDER 15 U.S.C § 2 (PRICING)

11 ||| 40. LV Skydiving realleges every allegation set forth above.

12 41. Groupon has gained the power to control prices and exclude competition in the
13 Market.

14 42. Groupon has engaged in willful predatory and exclusionary anticompetitive acts
15 directed at establishing and retaining Groupon's monopoly on the Relevant Services in the
16 Market, including, without limitation, effectuating the artificial depression of prices for the
17 Relevant Services in the Market in order to drive competitors out of business and/or to force
18 those competitors to allow Groupon to act as the seller of the Relevant Services provided by
19 those competitors.

20 43. LV Skydiving has been injured by Groupon's conduct in violation of § 2 of the
21 Sherman Act by losing revenue due to lost sales emanating from Groupon's anticompetitive
22 activity.

23 44. LV Skydiving is entitled to damages in relation to LV Skydiving's actual losses
24 as well as treble damages.

25 45. LV Skydiving is entitled to LV Skydiving's attorneys' fees and costs in bringing
26 this action.

SECOND CAUSE OF ACTION

MONOPOLIZATION UNDER 15 U.S.C § 2 (INTELLECTUAL PROPERTY MISUSE)

46. LV Skydiving realleges every allegation set forth above.

47. Groupon has gained the power to control prices and exclude competition in the Market.

48. Groupon has engaged in willful predatory and exclusionary anticompetitive acts directed at establishing and retaining Groupon's monopoly in the Market, including, without limitation, engaging in intellectual property misuse including, without limitation, the Metadata Infringement as part of the Groupon Scheme and thereby falsely leveraging, without permission, the intellectual property of businesses that are not Groupon Affiliates, including, without limitation, LV Skydiving, to illegitimately attain market share.

49. Groupon has engaged in willful predatory and exclusionary anticompetitive acts directed at establishing and retaining Groupon's monopoly in the Market, including, without limitation, engaging in the registered mark infringement and misappropriation of commercial property of LV Skydiving alleged further herein, to illegitimately attain market share.

50. LV Skydiving has been injured by Groupon's conduct in violation of § 2 of the Sherman Act by losing revenue due to lost sales emanating from Groupon's anticompetitive activity.

51. LV Skydiving is entitled to damages in relation to LV Skydiving's actual losses as well as treble damages.

52. LV Skydiving is entitled to LV Skydiving's attorneys' fees and costs in bringing this action.

THIRD CAUSE OF ACTION

DIRECT REGISTERED MARK INFRINGEMENT UNDER 15 U.S.C. § 1114(a)(1)

53. LV Skydiving realleges every allegation set forth above.

54. Groupon is using and has used LV Skydiving's Mark (as used by Groupon, the "Infringing Mark") in commerce in connection with the sale, offering for sale, distribution, and advertising of services without LV Skydiving's consent (the "Infringing Mark Use").

55. The Infringing Mark Use is likely to cause confusion, cause mistake, or deceive consumers and the public with respect to the services offered in commerce by Groupon.

56. Groupon has willfully engaged in the Infringing Mark Use with knowledge that the Infringing Mark Use constitutes infringement of LV Skydiving's Mark.

57. The Infringing Mark Use has damaged and will continue to damage the reputation and goodwill of LV Skydiving established in connection with LV Skydiving's Mark, in violation of 15 U.S.C. § 1114.

58. LV Skydiving has sustained actual damages as a direct and proximate result of the Infringing Mark Use, and Groupon is liable to LV Skydiving for up to three times the amount of those actual damages pursuant to 15 U.S.C. § 1117.

59. Groupon has profited as a direct and proximate result of the Infringing Mark Use, and Groupon is liable to LV Skydiving for the amount of those profits pursuant to 15 U.S.C. § 1117.

60. Groupon has incurred costs of suit in connection with bringing this action, and Groupon is liable to LV Skydiving for those costs of suit pursuant to 15 U.S.C. § 1117.

61. Groupon utilized LV Skydiving's Mark without authorization in derogation of LV Skydiving's exclusive rights under 15 U.S.C. § 1114.

FOURTH CAUSE OF ACTION

MISAPPROPRIATION OF COMMERCIAL PROPERTIES UNDER NEVADA

COMMON LAW

62. LV Skydiving incorporates and realleges every allegation set forth above.

63. LV Skydiving has invested significant time, effort, and money in creating, publicizing, and protecting LV Skydiving's Mark and developing valuable goodwill arising from and associated with LV Skydiving's Mark ("LV Skydiving's Commercial Property"), including, without limitation, investments of hundreds of thousands of dollars in financial outlays and time value in website creation and maintenance; search engine optimization; mark creation, development, and protection efforts; and advertising and promotional efforts.

64. LV Skydiving has preserved LV Skydiving's right to license, encumber, or sell

1 LV Skydiving's Commercial Property to individuals or entities while LV Skydiving has
 2 expended substantial resources to increase the value of such potential licensing, encumbrance, or
 3 sales.

4 65. Groupon misappropriated LV Skydiving's Commercial Property by
 5 misappropriating LV Skydiving's Mark for Groupon's enrichment without appropriately
 6 compensating LV Skydiving.

7 66. LV Skydiving has sustained and will continue to sustain damages as a direct and
 8 proximate result of Groupon's misappropriation of LV Skydiving's Commercial Property, and
 9 Groupon is liable to LV Skydiving for the amount of those present and future damages.

10 67. LV Skydiving has been required to retain an attorney to prosecute this action, and
 11 Groupon is liable to LV Skydiving for LV Skydiving's attorney fees to the extent allowed by
 12 law.

13 68. LV Skydiving has incurred costs of suit in connection with bringing this action,
 14 and Groupon is liable to LV Skydiving for those costs of suit.

15 **FIFTH CAUSE OF ACTION**

16 **UNJUST ENRICHMENT UNDER NEVADA COMMON LAW**

17 69. LV Skydiving realleges every allegation set forth above.

18 70. Groupon benefited from the infringement and misappropriation of LV
 19 Skydiving's Mark.

20 71. Groupon retained such benefits at the expense of LV Skydiving.

21 72. The benefit retained by Groupon in equity and good conscience belonged to LV
 22 Skydiving.

23 73. LV Skydiving has sustained damages as a direct and proximate result of
 24 Groupon's acts as alleged herein, and Groupon is liable to LV Skydiving for such damages.

25 **PRAYER FOR RELIEF**

26 LV Skydiving prays for judgment against Groupon as follows:

27

28

- 1 a. For three times LV Skydiving's damages caused by Groupon's anticompetitive
2 activity in violation of § 2 of the Sherman Antitrust Act pursuant to 15 U.S.C. §
3 15(a);
4 b. For three times LV Skydiving's actual damages and/or for Groupon's profits
5 caused by the Infringing Use;
6 c. For actual damages for the misappropriation by Groupon of the LV Skydiving
7 Commercial Properties;
8 d. For permanent injunctive relief against further infringement by Groupon of LV
9 Skydiving's Mark;
10 e. For equitable relief for the unjust enrichment of Groupon at LV Skydiving's
11 expense, in the form of disgorgement of profits and a permanent injunction;
12 f. For attorney fees from Groupon for Groupon's mark infringement and false
13 designation of origin pursuant to 15 U.S.C. § 1117(a);
14 g. For attorney fees from Groupon for Groupon's anticompetitive activity pursuant
15 to 15 U.S.C. § 15(a);
16 h. For costs of suit;
17 i. For prejudgment simple interest on actual damages beginning on the date of
18 service of this Complaint pursuant to 15 U.S.C. § 15(a); and
19 j. For any other relief this Court deems appropriate.

DEMAND FOR JURY TRIAL

LV Skydiving hereby requests trial by jury on all causes of action so triable.

Respectfully submitted this 10th day of December, 2018.

GIBSON LOWRY LLP

By /s/ J.D. Lowry.

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